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No. 92-9093

In The

Supreme Court of the United States

October Term, 1993

JOHN JOSEPH ROMANO,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The
Court Of Criminal Appeals Of Oklahoma

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?

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OPINION BELOW

The Court of Criminal Appeals of the State of Oklahoma affirmed the conviction for first-degree murder and sentence of death in an opinion rendered on January 13, 1993, *John Joseph Romano v. State of Oklahoma*, 847 P.2d 368 (Okla. Crim. App. 1993). The opinion is reproduced in the Joint Appendix (hereinafter "J.A.") 15.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. § 1257(3) (1990), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

Rehearing of the issues decided by the January 13, 1993, opinion of the Oklahoma Court of Criminal Appeals was denied on March 17, 1993. The petition for certiorari was filed on June 14, 1993, and granted on November 1, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It also involves the Due Process Clause of the Fourteenth Amendment (excerpt):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It further involves the following provisions of Oklahoma law: Okla. Stat. tit. 21, § 701.11 (1981):

> In the sentencing proceeding, the statutory instructions as determined by the judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla. Stat. tit. 21, § 701.12 (1991):

> Aggravating circumstances shall be:
>
> 1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

> 2. The defendant knowingly created a great risk of death to more than one person;
>
> 3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
>
> 4. The murder was especially heinous, atrocious, or cruel;
>
> 5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
>
> 6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
>
> 7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
>
> 8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

STATEMENT OF THE CASE

On January 30, 1987, Petitioner John Joseph Romano was sentenced to death for the murder of Lloyd Thompson in Oklahoma County District Court Case No. CRF-86-3920. One day before the sentence was formally

imposed for that murder, he was charged with the unrelated murder of Roger Sarfaty in Oklahoma County Case No. CRF-86-1231. The Petitioner was convicted of that murder as well. The sentence of death in the Thompson case was used to obtain a sentence of death in the Sarfaty case. This writ of certiorari concerns the second sentence of death.

In the Sarfaty case, the State sought and obtained the death penalty on the basis of four aggravating circumstances: 1) the Petitioner previously had been convicted of a felony involving the use or threat of violence to the person (specifically, the murder of Lloyd Thompson); 2) the murder was heinous, atrocious, or cruel; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and 4) a probability existed that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. (R. 23-24).

Most of the proof offered by the State in the penalty phase was by stipulation or documentary evidence. The parties stipulated that the defendant had been convicted of First-Degree Murder; to a portion of the autopsy report on Lloyd Thompson that explained the manner of death; that J.T. Rupe would testify that the defendants named in the prior convictions were the same defendants now on trial;[1] and that Officer McCornack of the Oklahoma City Police Department would testify that he saw wounds and

[1] Evidence of convictions for Obtaining Money by False and Bogus Check and Second-Degree Forgery were admitted to enhance the penalty for the robbery conviction.

blood on Lloyd Thompson's hands. (May 26, 1987, Tr. 45-47) [hereinafter Tr. VI].

The State also introduced the Judgment and Sentence from the Thompson murder conviction. That document revealed not only that the Petitioner had been convicted of first-degree murder, but also that he had been sentenced to death for that crime. The document also showed that an execution date had been set for April 20, 1987, which was approximately one month before the jury heard the present case.[2] Defense counsel objected to admission of the document on the grounds that it was improper support for the "prior violent felony" aggravating factor because the judgment was not final and further that the Thompson murder was committed after the present one. (Tr. VI 30, 32, 41).[3] After the trial court overruled these objections, defense counsel objected to admission of the Judgment and Sentence on the further ground that even if the conviction itself was admissible, the sentence he had received was not proper for the jury to consider. (Tr. VI 44). Although the parties stipulated that the Petitioner had been convicted of murder, (Tr. VI 45), the trial court nevertheless admitted the objectionable Judgment and Sentence document. (Tr. VI 46).

[2] The Judgment and Sentence directed the Warden to put the petitioner to death on April 20, 1987. (J.A. 6). Trial began in this case on May 18, 1987.

[3] Although both issues were raised on direct appeal and were matters of first impression in Oklahoma, the court did not address them as they were rendered moot by the invalidation of this aggravating circumstance on another ground.

Additionally, the State presented the testimony of several witnesses. Olie Irvin, who lived in the apartment below Lloyd Thompson, testified that on the day he was murdered, she saw him with someone fixing a tire on his car. When they finished, they went upstairs. (Tr. VI 26). She heard banging and knocking that persisted for five to seven minutes, and loud music. (Tr. VI 27). She did not identify anyone as the person whom she saw with Mr. Thompson.

Greg Myers, Petitioner's cellmate while he was waiting to be tried for the Lloyd Thompson murder, claimed that Petitioner admitted that he and his partner killed a man and that Petitioner offered to pay Mr. Myers money to kill some unnamed witnesses.[4] (Tr. VI 51-54).

Finally, Pat Stanley testified that Petitioner lived with her daughter, and that he did not act unusual the afternoon of July 19, 1986. (Tr. VI 60-61). In addition to this testimony, all of the evidence offered in the first stage of the trial was incorporated by reference. (Tr. VI 62).

Numerous people testified on Petitioner's behalf in the sentencing phase. Charles Vasquez, who had shared a cell with Petitioner and Greg Myers, testified that Greg Myers repeatedly offered to kill witnesses for $300. No one, including Petitioner, ever took him up on his offer. (Tr. VI 65).

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[4] While this case was on appeal, Mr. Myers recanted his testimony. He signed an affidavit swearing that none of his testimony was true, that he fabricated the story to curry favor with the District Attorney on charges pending against him, and that Petitioner never talked about his case.

James Romano, Petitioner's father, gave the jury a glimpse of his son's life. Petitioner, the oldest of four children, had a normal childhood and no problems at school until his parents divorced when he was fourteen years old. The divorce wrought turmoil, especially for Petitioner. He shuffled back and forth between his parents and started having problems in school. (Tr. VI 68-70).

Mr. Romano described his son as a normal, friendly, easy going, happy-go-lucky, very likeable boy. Despite having problems in school, he did graduate. (Tr. VI 72-73). Mr. Romano described the jobs his son held and the responsible way in which he repaid loans. (Tr. VI 73-77). Father and son enjoyed a good relationship. (Tr. VI 75). When Petitioner was convicted in 1984, his father was very upset, but their relationship remained about the same. (Tr. VI 77). Mr. Romano told the jury that although he did not condone everything his son had done, he loved him and did not want anything bad to happen to him. If his son were given a life sentence, he would visit him in the penitentiary and correspond with him. (Tr. VI 78).

Petitioner's mother, Patricia St. Clair, also testified about the adverse effect the divorce had on her son. After the divorce, she felt she lost control of him and suspected he was involved in drugs. The divorce was so bitter that she and Petitioner's father could not communicate. They let Petitioner go back and forth between their homes as he desired. (Tr. VI 88-89). Although he had problems in school, he finished high school by participating in a program that allowed him to go to school four hours per day and work full-time. (Tr. VI 89-90).

Mrs. St. Clair described the positive changes she had observed in her son since his incarceration. Since becoming a Christian, he had become a source of encouragement to her. (Tr. VI 92). She told the jury that her son had always been an important part of her life, that she loved him very much. If the jury would give him life, she would continue to communicate with and visit him. (Tr. VI 93).

David Oliver, a local businessman, testified that of the two or three hundred salespeople he had known over the last seventeen years at the car dealership where Petitioner worked, he impressed him as the most enthusiastic. Petitioner was eager to learn the business and showed much potential. (Tr. VI 80). Around 1984, however, he began running with a crowd involved with drugs. (Tr. VI 81, 83).

Charlie Greeson, an Oklahoma County Deputy Sheriff, knew Petitioner through his position as night jailer. During the eight months he had known Petitioner, he found him to be a good prisoner. Petitioner helped hold down trouble in the tanks. When a problem arose with a particular prisoner, he was asked to help out and did. (Tr. VI 84-85). Jerry Waynescott, another deputy sheriff assigned to the jail, echoed the testimony of Deputy Greeson. He recounted how Petitioner worked as a trustee, cleaned the cell and helped keep trouble down. (Tr. VI 93-94). Deputy Milton Hoskins' testimony was basically the same. (Tr. VI 95-96).

John Lowery, the inmate Petitioner had been asked to help, testified that he had been almost suicidal when he was returned to jail after being sentenced for second-degree manslaughter when someone died from drinking

moonshine whiskey. When the chaplain's assistant was unable to help him through his crisis, she called in Petitioner, who convinced him suicide was not the answer, helped him calm down, and afterward continued to counsel him. (Tr. VI 109-10). He declared that "[i]f it wasn't for John Romano I don't know what I would do." (Tr. VI 111).

Helen Pearce, an assistant chaplain in the Oklahoma County jail, had worked closely with Petitioner for almost a year. (Tr. VI 96-99). She had watched him grow as a person, develop and mature in his honesty and his character. He is the only person for whom she had ever been willing to be a character witness, and the only person for whom she had spent her own money to buy additional Bible study courses. Petitioner had completed 136 such courses at the time of trial and was working on another. (Tr. VI 99). She testified that Petitioner was deeply committed to a different way of life and that his goals had totally changed. (Tr. VI 100).

Sam House, chaplain of the Oklahoma County jail, characterized Petitioner as being very unstable and nervous when he first arrived in jail. (Tr. VI 103-04). Since that time, Chaplain Sam had witnessed a tremendous change in Petitioner's spiritual life. He was the first inmate to complete all 136 Bible correspondence courses. (Tr. VI 105). Chaplain Sam was so confident of Petitioner's religious convictions that he "would stake [his] life on it." Responding that John's life had more meaning to him "than you will ever know," he expressed the hope that the jury would not sentence Petitioner to death. (Tr. VI 107).

Petitioner personally told the jury about his life. He started working at age fifteen. (Tr. VI 115). After graduating from high school, he continued to work steadily. (Tr. VI 117-19, 122-25). When he was nineteen or twenty years old, he met a man who recruited him to run poker and blackjack games and sell quaaludes and speed. (Tr. VI 119). After a time, Petitioner joined the Air Force, but knee problems soon led to an honorable discharge. (Tr. VI 121-22). He had stopped using and selling drugs, but eventually returned to his previous lifestyle. (Tr. VI 122-23). Before long, he was convicted of forgery. (Tr. VI 125).

On the subject of this crime, Petitioner testified that he did not rob or kill Roger Sarfaty, and that he was not involved in the killing in any way. (Tr. VI 139). Contrary to first-stage witness Tracy Greggs' testimony, it was Greggs who had asked him to participate in robbing and killing Sarfaty, not vice-versa. (Tr. VI 136-37). Petitioner explained that the quarters[5] he had at Quail Springs Mall on October 12 were left over from playing blackjack the night before at the Stork Club. (Tr. VI 137, 143). On cross-examination, the State also questioned Petitioner about the Lloyd Thompson murder. Petitioner admitted that he was present when Mr. Thompson was killed, but denied participating in the killing. (Tr. 143-44).

Petitioner described how his life had changed since his arrest on a murder charge. He spoke of his spiritual

[5] Part of the circumstantial evidence offered at the guilt stage was that quarters were missing from the victim's apartment and that petitioner was seen with numerous quarters in a shopping mall around the time of the victim's death.

development and proudly identified the many certificates for completion of Bible courses. (Tr. VI 126-30). He told the jury that if his life was spared, he hoped to help other inmates to improve their lives. (Tr. VI 140). His goal was to live peacefully. (Tr. VI 136).

While the appeal from the conviction for the murder of Roger Sarfaty was pending in the Oklahoma Court of Criminal Appeals, that court reversed the murder conviction and accompanying death sentence for the killing of Lloyd Thompson and remanded the case for a new trial.

On direct appeal from the Sarfaty murder conviction the Petitioner argued that the sentence of death stood in violation of the Eighth Amendment because the jury's sense of responsibility was diminished by its knowledge that Petitioner already was under a death sentence, in addition to certain other acts and comments by the trial court and the prosecutors. The Oklahoma Court of Criminal Appeals agreed with Petitioner that the fact that he had been sentenced to death by another jury was irrelevant. The court also conceded that the jury's learning a defendant had been previously sentenced to death for a different murder "could diminish the jury's sense of importance of its role and mitigate the consequences of their decision." 847 P.2d at 390. Despite recognizing the error's potential to diminish the jury's sense of responsibility, the court presumed the jury's judgment to be correct and held that it was "highly unlikely" that this error had such effect because the jury had received instruction on its responsibility to weigh the evidence and to follow the law. The court further held that the erroneous "admission of this evidence did not so infect the sentencing determination with unfairness as to make

the determination to impose the death penalty a denial of due process." The death sentence was affirmed. 847 P.2d at 390-91.

SUMMARY OF ARGUMENT

Admission of evidence that the Petitioner had been sentenced to die for another murder plainly informed the jury that the determination of whether the Petitioner would live or die for his crimes already had been made by another jury. Consideration of Petitioner's capital sentence sapped the jury's sense of responsibility by leading the jury to believe that its decision, whether it be life imprisonment or death, would make no difference. Consequently, there is a danger jurors did not consider the mitigating evidence proffered.

Moreover, this evidence was misleading, materially inaccurate, and wholly irrelevant. There was no reason for its admission, and compelling reasons for its exclusion. Because it is impossible to determine that admission of this evidence had no effect on the jury's determination, the sentence of death is unreliable.

ARGUMENT

THE JURY'S SENSE OF RESPONSIBILITY FOR DETERMINING THE APPROPRIATENESS OF THE DEFENDANT'S DEATH WAS IMPERMISSIBLY AND NEEDLESSLY UNDERMINED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BY ADMISSION OF TOTALLY IRRELEVANT EVIDENCE THAT CREATED A BIAS IN FAVOR OF THE DEATH PENALTY.

Opinions by this Court have firmly established that reliability of sentencing in capital cases is indispensable under the Eighth Amendment. Recognition of the need for reliability of sentencing in capital cases flows out of the concerns expressed by Justices White and Stewart in *Furman v. Georgia*, 408 U.S. 238 (1972). "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Id.* at 306 (Stewart, J., concurring). Moreover, unless a death sentence is reliable, there is "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).

Just as reliability is essential to the Eighth Amendment, essential to reliability is a sentencer who "treat[s his] power to determine the appropriateness of death as an 'awesome responsibility.' " *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985). The jurors in the instant case were prevented from treating their power to determine the

appropriateness of Petitioner's death as an "awesome responsibility" by the admission of evidence that informed them that Petitioner was going to be executed regardless of their decision. Admission of evidence that a capital defendant already has been sentenced to death thus undermines the sentencer's sense of responsibility, creates a bias in favor of death, and strips the death sentence of reliability.

A. ADMISSION OF EVIDENCE THAT THE PETITIONER ALREADY HAD BEEN SENTENCED TO DEATH IMPERMISSIBLY UNDERMINED THE JURY'S SENSE OF RESPONSIBILITY AND CREATED A BIAS IN FAVOR OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

1. Evidence of the preexisting death sentence led the jury to believe the responsibility for Petitioner's death rested elsewhere and invited it to defer to the decision already made by another jury.

This Court has acknowledged that "[i]n evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of **determining whether a specific human being should die** at the hands of the State," and that "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion with – and indeed as indispensable to – the

Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' " *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985) (citations omitted) (emphasis added). In the case at bar, the sentencing jurors were needlessly prevented from viewing their task "as the serious one of determining whether a specific human being would die at the hands of the State" because of the admission of evidence which indicated that Petitioner would die at the hands of the state regardless of their decision in this case.

This Court ruled in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that a jury's sense of responsibility for determining the appropriateness of the death sentence in a specific case was impermissibly undermined where the jury was informed that its decision would be reviewed automatically by an appellate court. The Court reasoned that telling the jury that its decision will be automatically reviewed by an appellate court creates "an intolerable danger" that the jurors may feel that "the responsibility for any **ultimate determination of death** will rest with others." *Id.* at 333 (emphasis added).

In the case at bar, the jurors were informed that the ultimate determination of whether Petitioner was to be executed had already been made by a previous jury. Thus, in the instant case, there is even a greater danger that the jurors' sense of responsibility for determining whether Petitioner should be put to death was undermined, because the jurors were informed that Petitioner was going to be executed regardless of their decision. That is, the jurors knew that the ultimate responsibility for Petitioner's execution rested with the previous jury.

In *Caldwell*, where the prosecutor's comments "urged the jurors to view themselves as taking only a preliminary step toward" the defendant's execution, 472 U.S. at 336, the jurors knew that the defendant would not be put to death unless they affirmatively determined that he should be executed. Although the jurors in *Caldwell* may have been urged to view their decision to impose the death penalty as only a "preliminary step" toward the defendant's execution, at least they knew it was a **necessary step** in the process, a step without which the defendant's life would not be taken. In the instant case, however, the jurors were led to believe that their decision to impose the death penalty was not even a preliminary step toward Petitioner's execution, because he was going to be executed regardless of their decision.

In *Caldwell*, this Court determined that one reason the prosecutor's comments concerning the automatic appellate review of death sentences rendered the jury's determination unreliable is because such comments may suggest to the jurors that any errors they make may be corrected on appeal, thus increasing the possibility that "[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts." 472 U.S. at 331. This possibility is even greater when evidence that the defendant is already sentenced to die is admitted during the sentencing hearing, because the temptation to "send a message" of extreme disapproval even though the jurors are not convinced that death is the appropriate punishment is not tempered by the realization that their decision may result in a person being put to death.

This Court also observed that "[i]n evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive." 472 U.S. at 332-33. As the Court recognized:

> A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion.[citations omitted]. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Id. at 333.[6] The intolerable danger that jurors may minimize the importance of their role is even greater when evidence that the defendant is already sentenced to die is admitted during the sentencing hearing, because such evidence allows the jurors to conclude that their decision is not important. The *Caldwell* Court found it easy to envision a case in which jurors reluctant to inflict the

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[6] Similarly the Oklahoma Court of Criminal Appeals has often recognized that jurors may eagerly accept any invitation to avoid the difficult duty of passing sentence upon the life of the accused. *See, e.g., Johnson v. State*, 731 P.2d 993, 1005 (Okla. Crim. App. 1987).

death penalty, sitting on a jury equally divided on the punishment issue, might be persuaded to give in by an argument that appellate review would correct any mistake made by the jury. It is no further stretch of imagination to envision jurors reluctant to impose death being persuaded to give in because of the perception that if the defendant is to die at all, he will die because of what the other jury decided, not because of what this jury decides.

That jurors will take their sentencing responsibilities less seriously if they believe the defendant is going to be executed regardless of what they decide is common sense. As the United States Court of Appeals for the Fifth Circuit Court aptly noted, "[t]he decision of the Court in *Caldwell* reflects this reality, insight born more of experience than of empirical study or abstract exposition." *Sawyer v. Butler*, 881 F.2d 1273, 1282 (5th Cir. 1989), *aff'd sub nom. Sawyer v. Smith*, 497 U.S. 227 (1990).

With the exception of the Oklahoma Court of Criminal Appeals in the instant case, every state court of last resort to address the issue has concluded that admission of evidence of a prior death sentence impermissibly undermines the jury's sense of responsibility for determining whether the defendant should be put to death. In *West v. State*, 463 So. 2d 1048 (Miss. 1985), the jury, as in the case at bar, was given a Judgment and Sentence form during the sentencing stage of a capital case that indicated the defendant already had been sentenced to death in an unrelated case. Apparently recognizing the irrelevancy and prejudicial nature of that portion of the form, the trial judge tried to "scratch it out," but "it was nevertheless still readable upon close examination." 463 So. 2d at 1052. Thus, the Mississippi Supreme Court had to

determine whether admission of such evidence impermissibly undermined the jury's sense of responsibility.

That court observed that "[t]he role of juror in a capital murder trial brings with it an awesome responsibility. Fortunately, few of us are ever required to make the decision whether to end another human being's life; however, that is precisely the question confronting jurors following a guilty verdict in a capital case." *Id.* at 1053 (quoting *Wiley v. State*, 449 So. 2d 756, 762 (Miss.1984)). The court concluded that informing the jury that the defendant already had been sentenced to die impermissibly undermined the jurors' sense of responsibility:

> That portion dealing with sentence should have been excised in such a manner that the jury could not determine by examination that the appellant had been sentenced to death. The reason is that if the jury knows that the appellant is already under a sentence of death it would tend to relieve them of their separate responsibility to make that determination. . . . This jury should not have been given the **false hope** that their verdict was not the only and final determination of whether the death penalty would be imposed on West. **The burden on the jury should not be lessened by reference to the actions of courts of review or, in this case, courts of other jurisdictions.**

463 So. 2d at 1052-53 (emphasis added).

Similarly, when faced with this same issue, the Illinois Supreme Court held that "the jury's awareness of defendant's prior death sentence would diminish its sense of responsibility and mitigate the serious consequences of its decision." *People v. Davis*, 452 N.E.2d 525,

537 (Ill. 1983). In *Davis*, as in the Mississippi case and the case at bar, the jury was given a copy of the defendant's conviction in another case which indicated that the defendant had been previously sentenced to death. The Illinois Supreme Court reasoned that "[a]ssuming that defendant was already going to be executed, the jurors may consider their own decision considerably less significant than they otherwise would," and concluded that "this error alone is sufficient to warrant reversal of defendant's death sentence." 452 N.E.2d at 537.

The Supreme Court of Illinois also recognized the potential of such evidence to improperly influence a capital jury's determination of whether death was the appropriate punishment for the defendant. The court found that "introduction of such evidence may well have improperly influenced the jury's decision," because "[i]n determining his eligibility for the death penalty, the jury was aware that another jury had previously resolved the identical issue adversely to defendant," and thus, "[i]f a juror was uncertain as to whether defendant was qualified for the death sentence, the knowledge that twelve other people determined he was could have swayed the juror's verdict in favor of death." 452 N.E.2d at 537.

Shortly after *Davis*, the Illinois Supreme Court was confronted with a similar issue in *People v. Hope*, 508 N.E.2d 202 (Ill. 1986). In *Hope*, an inquiry conducted by the trial judge during the sentencing hearing revealed that two or three jurors had seen or read news reports the day before which disclosed the fact that the defendant had previously been sentenced to death for an unrelated murder. The Illinois Supreme Court concluded that "[t]he possibility that the jury, even one member, may have

sentenced the defendant to death on the basis of an **irrelevant, highly prejudicial** and nonstatutory aggravating factor constitutes reversible error." 508 N.E.2d at 206 (emphasis added).

Although this Court has never squarely addressed the issue of whether evidence of a previous sentence of death undermines the reliability of a capital sentencer's decision, the rationale of its opinion in *Baldwin v. Alabama*, 472 U.S. 372 (1985), is instructive. In that case, the Court reviewed the constitutionality of the former Alabama death penalty scheme. Under that procedure, a jury that found the defendant guilty of any one of a number of specified crimes "with aggravation" was required to fix the punishment at death. Had that been the end of the process, the scheme plainly would have violated the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), because it failed to provide for presentation of mitigating evidence to the jury. The jury's "decision," however, was not dispositive. After the jury made its determination, the trial judge was required to hear evidence of aggravation and mitigation, to weigh those circumstances, and to sentence the defendant to death or life imprisonment without parole.

Petitioner Baldwin contended that the jury's "decision" to impose death was an impermissible factor for the trial judge to consider because the jury's mandatory "sentence" standing alone would be unconstitutional. This Court noted that such argument might have merit if the judge were legally bound to consider the jury's sentence as a recommendation and to accord some deference to that decision. However, because the jury's "sentence" need not be given any weight in the sentencing equation

and the judge imposed the sentence after independently considering the defendant's background and character and the circumstances of his crime, the sentencing procedure was not unconstitutional.

The majority based its determination that the jury's "decision" was not a component of the judge's decision on three factors. First, the Alabama Supreme Court had construed the statute as requiring the sentencing judge to make the decision without regard to the jury's "sentence". 472 U.S. at 383. Second, there was no indication in the record that the trial court considered the jury's "sentence" in his determination. *Id.* at 385-86. Third, the sentencing judge would not have thought he owed any deference to the jury's "sentence" for the reason that it was mandatory and did not reflect consideration of mitigating circumstances. *Id.* at 386.

The Court's decision in *Baldwin* rested on the premise that the trial judge would not be swayed by the jury's sentence because of his knowledge that the "sentence" was mandatory and that the jury had no opportunity to consider mitigating circumstances. The Court reserved determination of the constitutionality of "a death sentence imposed by a judge who did consider the jury's verdict under this death penalty scheme as a factor that weighed in favor of the imposition of the death penalty." *Id.* at 386 n. 8.

None of the factors that persuaded the Court to sustain Baldwin's sentence are present here. In fact, the reverse of each is true. First, the jury was not instructed to make its decision without regard to the previous jury's

sentence. Rather, the jury was instructed to base its decision on the evidence presented in open court, and was instructed that admitted exhibits are evidence. (J.A. 3, 13). The jury was further told that "[t]he importance and worth of the evidence is for you to decide." (J.A. 13). Thus, the jury was allowed to consider the previous sentence of death and to assign whatever weight to that evidence it chose.

Second, jury determinations, unlike judicial determinations, are made in the privacy of the deliberation room. Apart from the checkmarks next to the alleged aggravating factors found to exist beyond a reasonable doubt, no record is made that would reveal "the countless factors and circumstances" upon which the decision to impose death rested. *See Zant v. Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring in judgment). Since the jurors were instructed to consider the evidence admitted during the course of the trial, (J.A. 3, 13), it must be assumed that they considered the evidence that the defendant previously had been sentenced to death. *See Yates v. Evatt*, ___ U.S. ___, 111 S. Ct. 1884, 1893 (1991) (that jurors follow the instructions they are given is a basic presumption of appellate practice); *see also Espinosa v. Florida*, 505 U.S. ___, 112 S. Ct. 2926 (1992).

Third, unlike the trial judge in *Baldwin*, who knew that the jury's death sentence was mandatory and therefore not entitled to any deference, the jurors in this case had no comparable legal knowledge that would prevent

them from being swayed by the previous jury's determination that death was the appropriate sentence.[7] They had no idea upon what evidence the other jury's decision was based, and certainly had no idea that the conviction and sentence were the result of an unfair trial. All they knew was that twelve other jurors had unanimously decided that Petitioner should be executed.

This Court in *Baldwin* thus recognized the potential for knowledge of a death sentence to exert great influence on a capital sentencer's decision. The Supreme Courts of Mississippi and Illinois squarely held that such knowledge does impermissibly undermine the capital sentencing jury's sense of responsibility and may improperly influence its determination of whether death is the appropriate punishment in the case. Analysis under *Caldwell* further demonstrates the specific defects that can arise in the deliberative process when jurors are led to believe that they do not bear full responsibility for the sentence they impose. Thus, admission of this evidence stands to pervert the jury's assessment as to whether death is the appropriate punishment.

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[7] Juries do not have the benefit of vast knowledge of the law that judges have. This Court has recognized this important fact in cases involving the aggravating factor "heinous, atrocious, or cruel" and its equivalents. When a jury is given inadequate instructions to cure the vagueness, its decision is disregarded because the jury would have had no way of knowing the proper limitation to put on the circumstance. A trial judge's finding of this circumstance, however, can be upheld because judges are presumed to be aware of any limiting construction the state appellate courts have placed on the aggravating circumstance. *See Walton v. Arizona*, ___ U.S. ___, 110 S. Ct. 3047, 3057 (1990).

2. Admission of evidence of the preexisting death sentence created a danger that the jury did not consider mitigating evidence.

This Court's decisions have firmly established that a capital sentencer may not be precluded from considering and giving effect to any mitigating aspect of a defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Penry v. Lynaugh*, 492 U.S. 302 (1989). The cause of the barrier to the jury's consideration of mitigating circumstances is of no importance; the result of preclusion of consideration of mitigating factors is the same whatever the cause: vacation of the death sentence is required. *See Lockett*, 438 U.S. 586 (1978) (plurality opinion) (barrier interposed by statute); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (same); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (barrier interposed by sentencing court's refusal to consider mitigating evidence); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (barrier interposed by evidentiary ruling); *Mills v. Maryland*, 486 U.S. 367 (1988) (barrier interposed by ambiguous jury instructions); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (barrier interposed by absence of instructions).

Indicating to the jury that, regardless of its verdict in this case, the defendant would be executed for the murder of Lloyd Thompson, created a substantial risk that the jury would not have given consideration to Romano's case for life. Some jurors may have believed the compelling mitigating evidence justified imposition of a life sentence; however, any jurors who accordingly would

have held out for a life sentence might have given in to those who wanted to impose the death penalty because of the belief that the Petitioner was doomed to die despite their contrary decision. If just one juror's decision to vote to impose the death penalty was based on the mistaken belief that he was powerless to spare the Petitioner's life, the sentence is unreliable.[8]

The requirement that the jury be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or circumstances of the crime is essential to ensure "reliability in the determination that death is the appropriate punishment in a specific case." *Penry*, 492 U.S. at ___, 109 S. Ct. at 2951 (quoting *Woodson*, 428 U.S., at 305). As in *Mills v. Maryland*, "[t]here is, of course, no extrinsic evidence of what the jury in this case actually thought." 486 U.S. at 381. But there is a substantial risk that jurors would have felt powerless to spare the Petitioner's life, even if they believed that a punishment less than death was appropriate for this crime, because of the false belief that he would be executed regardless of any decision they made to the contrary. That risk is unacceptable, especially considering "the ease with which that risk could have been

[8] Under Oklahoma law at the time this case was tried, if the jury was unable to agree on punishment in a capital case within a reasonable time, the judge was required to dismiss the jury and impose a sentence of life imprisonment. Okla. Stat. tit. 21, § 701.11 (1981). That is, even if eleven jurors wanted to impose death and only one wanted to impose life imprisonment, effect was given to the vote for life. The statute has been changed to give the judge the additional option of life without parole. Okla. Sess. Laws 1987, c. 96, § 3.

minimized." *Turner v. Murray*, 476 U.S. 28, 36 (1986) (footnote omitted).

3. Evidence of the preexisting death sentence was misleading.

The sentence of death itself was misleading. Justice O'Connor, writing for the majority in *Ramos*, upheld the constitutionality of a death sentence where the jury was instructed that the Governor has the power to commute a sentence of life without the possibility of parole. *California v. Ramos*, 463 U.S. 992 (1983). The Court found that the so-called "Briggs Instruction" not only was accurate information to aid the jury in selecting an appropriate sentence, but also that it served to correct a misconception that life without the possibility of parole means that the defendant could never be paroled under any circumstances. 463 U.S. at 1009.

In this case, admission of the Judgment and Sentence created a misconception analogous to that created by the misleading title of the sentencing option "life without the possibility of parole" in *Ramos*. Juries are not sufficiently familiar with the appellate process to know that appeals are not always processed in sequential order.[9] That is, the layperson would not know that appeals can leapfrog each other.[10] The jury, having heard that the Petitioner was

[9] It would, of course, be far less likely that a judge, knowledgeable in the law, would be misled by evidence of a non-final conviction and accompanying death sentence.

[10] The leapfrog possibility was realized in this case. Because the Thompson conviction was overturned on direct

already sentenced to death, would have reasonably assumed that he would be executed, if at all, for the Thompson murder.

Moreover, correction of this misconception by court instruction or by closing argument would have been constitutionally prohibited. The only way to dispel the misleading effect of the previous death sentence would be to explain to the jury that the death sentence was not final but was on appeal and what that means. Although the trial court, and indeed the document itself, stated that the conviction was not final and on appeal, it is unlikely that the jury understood those unadorned words. *Cf. Caldwell v. Mississippi*, 472 U.S. at 343 (O'Connor, J., concurring in part and concurring in the judgment) ("[l]aypersons cannot be expected to appreciate without explanation the limited nature of appellate review"). The jury's misperception of the impact of the prior death sentence thus went uncorrected unless the jurors understood the meaning of "not final" and "on appeal." In that event, they must have realized that their own decision would be subjected to appeal as well, and the identical infirmity that required a reversal in *Caldwell* is present. *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *see also California v. Ramos*, 463 U.S. 992, 1011 (1983) ("advising jurors that a death verdict is theoretically modifiable, and thus not 'final' may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and

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appeal, the Sarfaty conviction is now ahead in the appellate process. It now appears that the petitioner will be executed based on the determination of this jury.

for the moral responsibility reposed in them as sentencers").

A further problem needlessly created by the admission of the Judgment and Sentence form in this May 1987 trial, was that it informed the jury that Petitioner had been scheduled to be executed on April 20, 1987. The Judgment and Sentence form contained the following language: "defendant having been asked by the Court whether he had legal cause to show why Judgment and Sentence should not be pronounced against him, in conformity with the verdict of the jury, **and the defendant giving no good reason why said Judgment and Sentence should not be pronounced, and none appearing to the Court. . . .** " The Judgment and Sentence form went on to say that defendant was sentenced to death, in conformity with the jury's verdict, and that he intended to appeal. (J.A. 5-7). Just as "[l]aypersons cannot be expected to appreciate without explanation the limited nature of appellate review," *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring in part and concurring in the judgment), jurors cannot be expected to understand the very limited reasons why a Judgment and Sentence should not be pronounced. The jurors knew only that the defendant gave **no good reason** and that no good reason appeared to the court.

The Judgment and Sentence also set a date for Petitioner's execution that the jurors knew had not been carried out because Petitioner had appealed. Thus, there is an intolerable danger that the jurors sentenced Petitioner to death, not because they believed that death was

the appropriate punishment in this case, but out of frustration that the previous jury's decision to execute Petitioner, regarding which neither Petitioner nor the court could give good reason why it should not be pronounced, had not been carried out due to Petitioner's appeal. Alternatively, the jury may have speculated that a sentence of death in Oklahoma does not really mean the defendant will be executed. At the time the jury considered the defendant's fate, no one had been executed in Oklahoma since 1966. If so, the jury may have sentenced the Petitioner to death, not because of a determination that death was the appropriate sentence for this crime, but because of a belief that the effect of sentencing a defendant to death in Oklahoma does not result in death but rather in life imprisonment without possibility of parole, which was not a sentencing option under Oklahoma law at the time.

4. Evidence of the preexisting death sentence was materially inaccurate.

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), as in this case, the state alleged as an aggravating circumstance that the defendant previously had been convicted of a felony involving the use or threat of violence to the person of another. The only evidence introduced to support that aggravating factor was evidence of a prior felony conviction from New York. The jury imposed the death sentence. After the capital conviction and sentence had been affirmed on direct appeal, the New York conviction was reversed. Johnson unsuccessfully sought post-conviction relief. The Mississippi Supreme Court held

that vacation of the New York conviction did not affect the validity of the sentence. This Court reversed, finding that reversal of the conviction deprived the state's sole piece of documentary evidence of any relevance to the sentencing determination and that prejudice was apparent.

In this case, as in *Johnson*, the aggravating circumstance of "prior violent felony" was supported by only one felony conviction, and that conviction was eventually overturned, thus depriving the sole documentary evidence of any evidentiary value. Also as in *Johnson*, the error went beyond the invalidation of an aggravating circumstance supported by otherwise admissible evidence: "the jury was allowed to consider evidence that was revealed to be materially inaccurate." 486 U.S. at 590. When the Oklahoma Court of Criminal Appeals reviewed the Thompson murder conviction, it found that the conviction was the result of an unfair trial caused by the failure of the trial court to sever the trials of the Petitioner and his co-defendant and accordingly reversed the conviction. *Romano v. State*, 827 P.2d 1335 (Okla. Crim. App. 1992). Since the Judgment and Sentence were vacated, the document itself was materially inaccurate.[11]

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[11] The Court of Criminal Appeals held in this case that the Judgment and Sentence which had been vacated by that court no longer provided proper support for the aggravating circumstance "prior violent felony." 847 P.2d at 389.

When the petitioner was retried for the Thompson homicide, he was again convicted and again sentenced to death. This fact does not breathe new life into the invalidated death sentence. The sentence of death that the jury considered is null and void. They did not consider the new sentence of death. Moreover, the real question here is not whether the petitioner would have received the same result had his first trial in the Thompson

Clearly, Petitioner's four-month-old death sentence for murder was inherently far more prejudicial than Johnson's twenty-year-old conviction for second-degree assault with intent to commit first-degree rape. Emphasis on the fact was not required for tremendous prejudice to result. Moreover, this Court found that even in the absence of the express argument made in *Johnson*, "there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.' " *Johnson*, 486 U.S. at 586 (*quoting Gardner v. Florida*, 430 U.S. at 359 (plurality opinion)). In this case, there is likewise a possibility that the jury's belief that the Petitioner had been sentenced to die was the decisive factor in the choice between a life sentence and a sentence of death.

5. Admission of evidence which could not be explained or denied violated due process.

Reaffirming that the sentencing phase of a capital case must satisfy the requirements of the Due Process Clause, in *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion), this Court held that the petitioner was denied due process when the decision to sentence him to die was

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case been a fair trial, but rather, whether the sentence in this case might have been different if the jury had not learned of the prior sentence or had known that it was a conviction and sentence resulting from an unfair trial. *Cf. United States v. Tucker*, 404 U.S. 443, 447-48 (1972) (consideration of prior convictions, obtained without assistance of counsel, was improper on question of sentence; fact that defendant might have been convicted even with the assistance of counsel was irrelevant).

based, at least in part, on confidential information that he had no opportunity to explain or deny. *Id.* at 362. Conversely, in *Barefoot v. Estelle*, 463 U.S. 880 (1983), this Court held that introduction at the penalty phase of expert psychiatric testimony regarding future dangerousness did not present such a problem because the adversarial process, i.e., cross-examination and contrary evidence, could uncover any unreliability. *Id.* at 898-901.

Although the evidence in this case was made known to the defendant and his attorney, unlike the confidential pre-sentence investigation report in *Gardner*, the Petitioner had no realistic means to explain or deny the evidence. The collective opinion of the Thompson jury was admitted without having the jurors present for cross-examination. A sentence of death, while guided by objective factors, is necessarily a "highly subjective" decision.[12] *Caldwell*, 472 U.S. at 340 n.7. The only way to "explain" why the jury might have decided death was the appropriate punishment for the Thompson murder would have been to cross-examine individually all twelve jurors who made that decision. "[C]ontrolling considerations of . . . public policy, [however,] dictate that jurors cannot be called . . . to testify to the motives and influences that led to their verdict." *McCleskey v. Kemp*, 481 U.S. 279, 296 (1987) (internal quotation marks and citations omitted). "The capital sentencing decision requires the individual

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[12] Petitioner does not suggest that evidence of prior convictions are likewise impossible to explain or deny. "[S]entencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of particular elements that returning a conviction does." *Zant v. Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring in judgment).

jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments are difficult to explain." *Id.* at 311.

The only way to "deny" that the sentence was a lawful one which could be relied upon would have been to call the judges on the Oklahoma Court of Criminal Appeals and question them about the validity of the conviction and sentence. While theoretically this might have been possible, it certainly was not realistically available.

Affording the defendant an opportunity to explain or deny evidence used against him in a capital sentencing determination is an elemental due process requirement. *See Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986); *id.* at 9 (Powell, J., concurring in judgment). It follows that admission of evidence that by its very nature cannot be explained or denied likewise violates due process. Because a preexisting sentence of death is such a factor, it should not be admitted, and a sentence of death based on such a factor therefore violates due process.

B. ADMISSION OF EVIDENCE THAT THE PETITIONER ALREADY HAD BEEN SENTENCED TO DEATH FOR ANOTHER CRIME NEEDLESSLY UNDERMINED THE JURY'S SENSE OF RESPONSIBILITY BECAUSE SUCH EVIDENCE WAS IRRELEVANT TO ANY VALID STATE PENOLOGICAL INTEREST.

In making the formidable determination of whether an individual defendant should live or die, a capital

sentencer must be allowed to consider all possible **relevant** information. *California v. Ramos*, 463 U.S. 992 (1983). The State has never contended that evidence of the preexisting death sentence was relevant. No such argument was presented at trial, on appeal, or in the State's response to the petition for writ of certiorari. Indeed, no such argument would be tenable under the rulings of this Court. Although the evidence was admitted to prove the aggravating factor "prior violent felony," the stipulation concerning the conviction would have been sufficient alone to satisfy that circumstance. Introduction of the Judgment and Sentence as well added nothing to the proof of this circumstance and needlessly undermined the jury's sense of responsibility.

Evidence concerning the circumstance of the crime or the nature and background of the defendant is generally considered to be relevant. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (consideration of the character and record of the individual offender and the circumstances of the particular offense is a constitutionally indispensable part of the *process* of inflicting the death penalty); *Barclay v. Florida*, 463 U.S. 939 (1983) (defendant's prior criminal record is highly relevant to his individual background and character); *Zant v. Stephens*, 462 U.S. 862 (1983) (same); *Sumner v. Shuman*, 483 U.S. 66, 80 (1987) (past convictions of other criminal offenses are relevant); *Lockett v. Ohio*, 438 U.S. 586 (1978) (the sentencer cannot be precluded from considering any aspect of a capital defendant's character, record, or any of the circumstances of the offense that a defendant proffers as a basis for a sentence less than death); *Eddings v.*

Oklahoma, 455 U.S. 104 (1982) (sentencer must be permitted to consider sixteen-year-old defendant's family history); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (evidence of defendant's adjustment to incarceration is relevant mitigating evidence that cannot be excluded).

Consideration of factors that are constitutionally impermissible, misleading, or totally irrelevant to the sentencing decision, however, violates due process. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578 (1988) (invalidated conviction is not relevant evidence); *Dawson v. Delaware*, 503 U.S. ___, 112 S. Ct. 1093 (1992) (abstract beliefs that are protected by the First Amendment and that have no nexus to the case are irrelevant); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (race, religion, political affiliation are not relevant considerations).

Although the Constitution does not prohibit consideration at the sentencing phase of information not relating directly to either statutory aggravating or statutory mitigating factors, the information must be relevant either to the character of the defendant or to the circumstances of the crime. *Barclay v. Florida*, 463 U.S. 939 (1983) (Stevens, J., concurring in the judgment). *See also Zant v. Stephens*, 462 U.S. 862, 878-79, 885-89 (1983). Evidence that a capital defendant already has been sentenced to death is relevant to neither concern. Obviously, the particular punishment assessed for the killing of Lloyd Thompson is irrelevant to the circumstances of the Sarfaty homicide.

Moreover, the sentence of death is equally irrelevant to the character of the defendant. This Court observed in *Sumner v. Shuman* that the "simple fact that a particular inmate is serving a sentence of life imprisonment without

the possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death." 483 U.S. at 80. The simple fact that a capital defendant has previously been sentenced to death does not contribute at all to the profile of that person for purposes of determining whether he should be sentenced to death. Although evidence of crimes committed after a murder could be relevant in determining whether a defendant poses a continuing threat to society, and evidence of a sentence meted out before another crime is committed could be relevant to show that the defendant did not "learn his lesson,"[13] evidence that a sentence of death was imposed for an unrelated crime has no conceivable relevance to the appropriate sentence for the first murder committed. Such evidence says absolutely nothing about the defendant's character or background, or the circumstances of the crime.

This total lack of relevance to the capital sentencing determination has been recognized by every state court that has considered the issue. In the case at bar, the Oklahoma Court of Criminal Appeals held that "evidence of the imposition of the death penalty by another jury is **not relevant in determining the appropriateness of the**

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[13] Petitioner does not contest the legitimacy of Oklahoma's aggravating factors that "the defendant was previously convicted of a felony involving the use or threat of violence to the person" or that "the murder was committed by a person while serving a sentence of imprisonment on conviction of a felony." Such factors serve to narrow the class of persons eligible for the death penalty and reasonably justify imposition of that sentence.

death sentence for the instant offense. . . . . " *Romano v. State*, 847 P.2d 368, 391 (Okla. Crim. App. 1993) (emphasis added). In *People v. Davis*, 452 N.E.2d 525 (Ill. 1983), the Supreme Court of Illinois held that the fact that "defendant received the death sentence for a prior murder **has absolutely no relevance** to the issue of whether he is eligible to receive that penalty for the instant offense." *Id.* at 537 (emphasis added). *See also People v. Hope*, 508 N.E.2d 202, 206 (Ill. 1986) ("The possibility that the jury, even one member, may have sentenced the defendant to death on the basis of an **irrelevant**, highly prejudicial and non-statutory aggravating factor [of a prior death sentence] constitutes reversible error.") (emphasis added). Thus, every state court to consider the issue has concluded that evidence of a prior death sentence serves no legitimate purpose whatsoever and is irrelevant to the capital sentencing determination.

This is the Court's first opportunity to decide whether evidence of a prior death sentence is relevant to the capital sentencing determination. The recent, thorough examination by this Court in *Dawson v. Delaware*, 503 U.S. ___, 112 S. Ct. 1093 (1992), of whether introduction of evidence in a capital sentencing proceeding concerning the defendant's membership in the Aryan Brotherhood, a white racist prison gang, was relevant to any issue being decided in the proceeding, provides a useful framework for analyzing this question. The *Dawson* Court considered and rejected every imaginable context in which the Aryan Brotherhood evidence might have been relevant. The evidence was not tied in any way to the murder of Dawson's victim (both the defendant and the victim were white); no element of racial hatred

was involved in the killing; the evidence did not prove that the Aryan Brotherhood had committed any unlawful or violent acts; the evidence did not support any of the aggravating circumstances; the evidence was not relevant character evidence; and the evidence was not relevant to rebut any mitigating evidence offered by Dawson. *Id.* at ___, 112 S. Ct. at 1098. In sum, as eight members of this Court agreed, this evidence had no relevance whatsoever, and further, that its admission created a substantial danger that the jury might punish the defendant for his abstract beliefs.

The evidence in this case that the Petitioner already had been sentenced to death was likewise totally irrelevant to the sentencing determination. The evidence concerning the preexisting sentence of death was not tied in any way to the unrelated, previously-committed murder of Sarfaty; the **sentence** did not prove that Petitioner had committed any unlawful or violent acts; it did not support any of the aggravating circumstances; and it said nothing whatsoever about the character of the Petitioner. Admission of the evidence created a substantial danger that the jury deferred to the other jury's determination rather than determining for itself the appropriateness of death in this instance.

Furthermore, evidence of a prior death sentence is not relevant in the way that victim impact evidence is. In *Payne v. Tennessee*, 501 U.S. ___, 111 S. Ct. 2597 (1991), this Court held that evidence concerning the effects of the murder on the victim's family was relevant both to the meaningful assessment of the defendant's moral culpability and blameworthiness, and for rebuttal of mitigating evidence presented by the defendant. Evidence of

what a different jury decided was appropriate punishment for a separate crime, however, is neither relevant to the specific harm caused by the defendant, nor for assessing meaningfully the defendant's moral culpability and blameworthiness, nor for rebutting mitigating evidence presented by the defendant. In sum, the evidence is not relevant to any constitutionally permissible factor.

This Court has made clear that the decision to impose the death penalty "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or **totally irrelevant to the sentencing process.**' " *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884-85, 887 n. 24 (1983) (emphasis added)). Because the sentence of death in this case was predicated, at least in part, on totally irrelevant information, the death sentence is unreliable.[14]

C. THE OKLAHOMA COURT OF CRIMINAL APPEALS USED THE WRONG STANDARD TO DETERMINE THE IMPACT OF THE ADMISSION OF EVIDENCE THAT THE PETITIONER ALREADY HAD BEEN SENTENCED TO DEATH.

The Oklahoma Court of Criminal Appeals conceded that "[l]earning that the defendant had previously

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[14] Even if this Court finds evidence of the preexisting death sentence relevant, the evidence was nevertheless "so unduly prejudicial that it render[ed] the trial fundamentally unfair," *Payne v. Tennessee*, ___ U.S. ___, 111 S. Ct. 2597, 2608 (1991) and risked "a verdict impermissibly based on passion, not deliberation." *Id.* at ___, 111 S. Ct. at 2614 (Souter, J., concurring).

received a death sentence for another murder could diminish the jury's sense of importance of its role and mitigate the consequences of their decision," yet decided that, "when the jury is properly instructed as to its role and responsibility in making such a determination we cannot, on appellate review, conclude that the jury in any way shifted the responsibility for their decision or considered their decision any less significant than they would otherwise." *Romano v. State*, 847 P.2d 368, 390 (Okla. Crim. App. 1993). Thus, the Oklahoma Court of Criminal Appeals applied an inappropriate standard of review.

This Court has consistently held that the "qualitative difference" of death from other punishments requires "a correspondingly higher degree of scrutiny of the capital sentencing determination," *California v. Ramos*, 463 U.S. at 998-99; *see also Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Gardner v. Florida*, 430 U.S. 349, 358 (1977), and that there is a corresponding difference in "the need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). The Oklahoma Court of Criminal Appeals acknowledged this need for heightened scrutiny, but then paradoxically presumed the jury's determination to be correct: "Reviewing the sentencing determination in the present case under this heightened standard, but also with a presumption of correctness, we find no reason to question the jury's conclusion." This presumption that the jury's conclusion was correct is fundamentally at odds with the inquiry required. *See Sawyer v. Smith*, 497

U.S. 227, ___, 110 S. Ct. 2822, 2832 (1990) ("our concern in *Caldwell* was with the '**unacceptable risk**' that misleading remarks could affect the reliability of the sentence") (emphasis added).

The court should have used the test espoused by this Court in *Caldwell*, which requires the **state** to prove that the admission of defendant's prior death sentence had no effect on the sentencing decision. The standard applied by the Court of Criminal Appeals improperly placed on the **defendant** the virtually insurmountable burden of proving that the admission of his prior death sentence did, as a matter of fact, affect the jury's sentencing decision. This standard not only conflicts with the standard employed in *Caldwell*, but is also contrary to the standard applied by this Court in other cases in which the Court has examined the reliability requirement of the Eighth Amendment.

> This Court has held that
>
> > a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation **creates the risk** that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett v. Ohio, 438 U.S. 586, 605 (1978) (emphasis added). "When the choice is between life and death, that **risk** is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* Thus, although this Court did not specify the degree of such risk which must exist in order for the death sentence determination to be rendered unreliable under the Eighth Amendment,

it clearly did not require the Petitioner to prove that the asserted Eighth Amendment error did, in fact, contribute to the sentencing decision.

Similarly, in *Gardner v. Florida*, 430 U.S. 349 (1977), this Court ruled that the reliability requirement of the Eighth Amendment prohibited a death sentence from being imposed if it might have been based in part on a confidential report that may have contained inaccurate or misleading information. As this Court has since noted concerning *Gardner*, "[b]ecause of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed." *California v. Ramos*, 463 U.S. 992, 1004 (1983). Thus, in *Gardner*, in order to establish a violation of the reliability requirement of the Eighth Amendment, this Court did not require the petitioner to prove that the confidential report did, as a matter of fact, contribute to the sentencing decision, but only that it had the **potential** to do so.

In *Johnson v. Mississippi*, this Court acknowledged that "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." 486 U.S. 578, 584 (1988) (citations omitted). This Court held that this principle was violated by the admission of evidence of a conviction which subsequently had been reversed because, even if the prosecutor had not expressly urged the jury to consider it, "there would be a **possibility** that the jury's

belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.' " 486 U.S. at 586 (citation omitted) (emphasis added). Thus, the petitioner was only required to show that there was a **possibility** that the reversed conviction impermissibly influenced the sentencing determination.

This Court has also ruled that a state law that prohibited a jury instruction on any lesser included offense in a capital case violated the reliability requirement of the Eighth Amendment because "the unavailability of the lesser included offense instruction enhance[d] the risk of an unwarranted conviction." *Beck v. Alabama*, 447 U.S. 625, 638 (1980). In *Beck*, the petitioner was only required to establish that the absence of the lesser-included instruction increased the risk of an unwarranted conviction, not that it actually did affect the verdict in that case.

The admission of the Judgment and Sentence form indicating that Petitioner was already under a sentence of death rendered the jury's sentencing determination unreliable under the Eighth Amendment, regardless of which standard from this Court's cases involving the Eighth Amendment reliability requirement is applied. That is, under the *Caldwell* standard, "it cannot be said" that the jury's awareness of the preexisting death sentence "had no effect on the sentencing decision"; under the language used in *Lockett* and *Beck*, the jury's knowledge of Petitioner's prior death sentence "enhanced the risk" of an unwarranted death sentence; under the *Gardner* test, the jury "potentially might have based its decision in part" on the fact that Petitioner was already under a sentence of death; and under the *Johnson* standard, there is a

possibility that jurors' belief that Petitioner was going to be executed regardless of their decision contributed to their choosing to sentence him to death. Thus, in holding that the admission of the evidence at issue was not constitutional error because the court could not conclusively determine that it in fact undermined the jury's sense of responsibility, the Oklahoma Court of Criminal Appeals applied an inappropriate standard.

The Oklahoma Court of Criminal Appeals further erred in its reliance on the jury instructions to prevent knowledge of the preexisting death sentence from diminishing their sense of responsibility. Without explaining how the instructions would have had such effect, the court merely noted that "[t]he jury was instructed that it had the responsibility for determining whether the death penalty should be imposed," and that "[i]t was never conveyed or intimated in any way by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized." 847 P.2d at 390. The instructions given in this case were comparable to the instructions given in *Caldwell*, and, of course, the *Caldwell* majority did not find that those instructions would have prevented the jury from believing that the responsibility for the death sentence rested elsewhere.

Furthermore, in *Caldwell* the information that led the sentencer to believe responsibility for the death sentence rested elsewhere came in the form of argument, and the jury was specifically instructed to find facts based upon the **evidence**. 472 U.S. at 352. In the instant case, the information that led the jurors to believe responsibility for the death sentence rested elsewhere came in the form

of **evidence**. The jury was affirmatively instructed to base its decision on the evidence, (J.A. 3, 13), and never instructed not to consider the evidence indicating that Petitioner was already under a death sentence. Unlike the situation in *Caldwell* where the jury was instructed not to utilize the misleading and inaccurate argument that was made, here the instructions actually exacerbated the prejudicial influence of the admission of the evidence that Petitioner was already sentenced to die. The curative instructions were insufficient to guard against the prejudicial influence of the information even in *Caldwell*. Here, not only were no curative instructions given, the instructions added to the error.

Petitioner submits that evidence which undermines the jury's sense of responsibility casts so much doubt on the reliability of the deliberation process that it can never be considered harmless. This Court may decide, however, that the harmless error rule, which is generally employed when constitutionally impermissible evidence is admitted in a capital sentencing hearing, can be applied. Even under that standard, it is clear that the death sentence should be vacated.

Under a harmless error analysis, the test is not whether the legally admitted evidence would support the death sentence, but rather, whether the state has proved beyond a reasonable doubt that the error complained of did not contribute to the jury's decision. *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). Petitioner respectfully submits that the state has not, and indeed cannot, prove beyond a reasonable doubt that the admission of evidence that he already had been sentenced to death did not contribute to the jury's decision. Short of explicitly

telling the jury that its decision did not matter, admission of evidence of a preexisting death sentence would have a more pervasive influence on the jury's sense of responsibility than any other kind of evidence. An error does "not contribute to a verdict" only if it is unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. *Yates v. Evatt*, ___ U.S. ___, 111 S. Ct. 1884 (1991). The influence of evidence of a preexisting death sentence is pervasive. Because the State did not prove beyond a reasonable doubt that the evidence did not influence the sentencing jury, the judgment must be reversed.

CONCLUSION

Until the Oklahoma Court of Criminal Appeals' decision in this case, every court to consider the issue had determined that the admission of evidence that a capital defendant already had been sentenced to death was irrelevant and impermissibly undermined the jury's sense of responsibility. If the death sentence in this case is allowed to stand, there is a risk that Petitioner will be executed although no sentencer has made a reliable determination that death is appropriate in this case. That risk is unacceptable, especially considering "the ease with which that risk could have been minimized." *Turner v. Murray*, 476 U.S. 28, 36 (1986) (footnote omitted). The Oklahoma Court of Criminal Appeals' judgment should be reversed

insofar as it leaves undisturbed this unreliable sentence of death.

Respectfully submitted,

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